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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-452

CATHERINE J. HEALY, et al.,

Petitioners,

vs.

F. DON JAMES, etc., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES, *AMICUS CURIAE*

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Interest of the *Amicus Curiae*

The American Association of Presidents of Independent Colleges and Universities is a corporation whose members are the presidents of more than 170 independent colleges and universities located throughout the United States. The Association is organized pursuant to the Business Corporation Act of the District of Columbia, and is authorized by its charter to take public positions on matters of concern to its members and the educational community. Because of the important issues presented by this case, the filing of an *amicus curiae* brief has been authorized by the Association's Board of Directors, and the consents of the parties have been filed with the Clerk of this Court.

The Importance of This Case

The issues presented by this case are of great importance to every educational institution in the country. The relevant facts are simple and require only summary recapitulation in this brief.

Plaintiffs are students at Central Connecticut State College. In September, 1969 they requested the College to grant official recognition to a local chapter of the Students for a Democratic Society ("SDS") (App. 20). They professed that the chapter would not be "under the dictates of any National organization" (App. 92), and their application set forth a statement of purposes and certain additional information required by College procedures (App. 13). Official recognition would have entitled plaintiffs to a variety of privileges including the privilege of seeking financial support from the student government. (App. 16-17, 95).

On October 16, 1969 plaintiffs' application was approved by the College's Student Affairs Committee by a 6-2 vote and submitted to President James (App. 99-100). On October 30 President James denied the application on the ground that:

> The published aims and philosophy of the Students for a Democratic Society, which include disruption and violence, are contrary to the approved policy (by faculty, students, and administration) of Central Connecticut State College which states:
>
> > "Students do not have the right to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others."
>
> The further statement . . . that "CCSC Students for a Democratic Society are not under the dictates of any

> National organization" in no way clarifies why if a group intends to follow the established policy of the College, they wish to become a local chapter of an organization which openly repudiates such a policy. (App. 15-16).

Plaintiffs were accordingly informed that they could not hold meetings on College property (App. 16-17). They then brought this action in the United States District Court for the District of Connecticut. On April 24, 1970, the District Court directed the College to hold an administrative hearing designed, among other things, to permit plaintiffs to clarify both the nature of their proposed organization and its relationship with the national SDS.[1]

The administrative hearing ordered by the District Court was held on May 19 and 25, 1970. Although plaintiffs were given a full opportunity to present evidence, they refused to clarify the relationship of the proposed local chapter to the national SDS. They presented nothing more than an insignificant name change and the assertion that they would not be connected with the "structure" of the national SDS (App. 101-2). They in no way disclaimed adherence to the *policies* of the national organization, even after a showing that (1) the national SDS expects local chapters to operate within its policies (App. 79), and (2) that the policies and operations of the national SDS placed heavy emphasis on acts of disruption and violence (App. 85-91). Plaintiffs themselves refused to say whether or not the local chapter would engage in such acts (App. 95). At the end of the hearing President James adhered to his earlier denial of official recognition (App. 103-5), and his decision was affirmed by the courts below.[2]

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[1] *Healy* v. *James,* 311 F.Supp. 1275 (D. Conn. 1970).

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[2] *Healy* v. *James,* 319 F.Supp. 113 (D. Conn. 1970), affirmed, *Healy* v. *James,* 445 F.2d 1122 (2d Cir. 1971).

It is readily apparent that the issues raised by these facts present questions of great public importance. The basic issue, of course, is whether it was improper for the College to deny official recognition and support to plaintiffs' proposed local chapter of the SDS. Implicit in that issue, however, is a whole spectrum of questions concerning the constitutional powers of public educational institutions. And these questions are not limited to colleges and universities, but arise at all levels of public education.

SUMMARY OF ARGUMENT

I. The central fact in this case is that the College acted not from "undifferentiated fear or apprehension of disturbance", but because of the threat of disruption and violence. The acts and policies of the national SDS demonstrate its disruptive nature, and it was further shown that the national SDS expects local chapters to conform to its policies. Under these circumstances the College was at the very least entitled to ask plaintiffs whether they themselves would renounce acts of disruption and violence. Cf. *Law Students Research Council* v. *Wadmond*, 401 U.S. 154 (1971); *In Re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961). And when plaintiffs expressly declined to do so the College was fully justified in refusing to sanction and support the proposed local chapter.

II. Although it is not disputed that students at state colleges are entitled to exercise constitutional rights, it is equally well settled that student behavior is subject to reasonable regulation. *Tinker* v. *Des Moines Community School District*, 393 U.S. 503 (1969); *Waugh* v. *Board of Trustees of the University of Mississippi*, 237 U.S. 589 (1915). And this is particularly true when the regulation is designed to prevent disruptive conduct which is not immunized by constitutional guarantees of freedom of

speech. In this case the College's decision was designed to prevent just such disruptive conduct and in no way impeded expression of plaintiffs' personal beliefs.

III. In considering the propriety of particular regulations, the courts have taken into account the specialized nature and functions of educational institutions. *Sword* v. *Fox*, 446 F.2d 1091 (4th Cir. 1971). A university must not only be permitted to maintain an atmosphere of academic freedom for the benefit of all its members, but is entitled to set standards of conduct which are higher than the minimum required in the surrounding community. For these reasons the courts have not mechanically adopted the "clear and present danger standard" urged by plaintiffs, but instead have permitted regulation based on the reasonable anticipation of disruptive conduct. *Tinker* v. *Des Moines Community School District, supra,* 393 U.S. 503 (1969). The courts have further recognized that the appropriateness of particular regulations is a discretionary question for the school authorities subject to only limited judicial review. *Epperson* v. *Arkansas,* 393 U.S. 97 (1968). The decision of the College was in complete conformity with these principles and should accordingly be upheld.

ARGUMENT

I. THE EVIDENCE IN THIS CASE FULLY JUSTIFIED THE FINDING OF THE COLLEGE AND THE COURTS BELOW THAT THE PROPOSED SDS CHAPTER PRESENTED A THREAT OF DISRUPTION AND VIOLENCE.

In considering the propriety of the decision of Central Connecticut State College, one fact is of central importance. That fact is that the College acted not because of "undifferentiated fear or apprehension of disturbance", but because of a reasoned refusal to sanction an organization dedicated

to disruption and violence. The violent nature of the national SDS has been set forth at length in the *amicus* brief of the Americans for Effective Law Enforcement and is not disputed by plaintiffs themselves. As the Court remarked in *Cole* v. *Trustees of Columbia University*, 300 F. Supp. 1026, 1028 (S.D.N.Y. 1969):

> In accordance with its aims and purposes, [SDS] has both directly and indirectly participated in campus disorders which have resulted from the spread of student unrest.

It was this organization with which plaintiffs sought to become affiliated; and it is absurd to contend that its violent history should have been ignored by the College. Quite the contrary, and even apart from the fact that the national SDS expects local chapters to conform to its policies (App. 79), the College had both the right and the duty to ask plaintiffs whether, at the very least, they themselves would agree to refrain from disruptive and violent acts. Cf. *Law Students Research Council* v. *Wadmond*, 401 U.S. 154 (1971); *In Re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961). But that is precisely what plaintiffs here expressly refused to do:

> "Q. How would you respond to issues of violence as other S.D.S. chapters have?
> "A. Our action would have to be dependent upon each issue.
> "Q. Would you use any means possible?
> "A. No I can't say that; would not know until we know what the issues are.
>
> • • • • •
>
> "Q. Could you envision the S.D.S. interrupting a class?
> "A. Impossible for me to say." (App. 95)

The foregoing answers reflect not only insensitivity to the legitimate interests of the College but a failure to acknowledge minimum standards of appropriate conduct. Under these circumstances it was not improper for the

College to determine that plaintiffs' chapter presented a threat of disruption.[3]

Furthermore, plaintiffs' own testimony completely rebuts their contention (Brief, 19) that the lower courts' decisions were "the equivalent of . . . a default judgment." In the first place, this contention is utterly false to the extent it is meant to imply that plaintiffs were not given an opportunity to present evidence. Quite the contrary, plaintiffs were provided with a full administrative hearing governed by elaborate standards designed to allow them a complete opportunity to clarify the issues.

Secondly, both courts below carefully examined the evidence offered at the administrative hearing. And both courts held that under the circumstances it was not unreasonable to require plaintiffs to come forward with evidence which would satisfy the College's legitimate interest in refusing to sponsor disruption and violence. When plaintiffs failed to produce such evidence, the decision against them was entirely justified.[4]

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[3] Although plaintiffs did offer evidence that an SDS chapter at *another* campus had no connection with any outside group (App. 68-69), that evidence was not responsive to the central question of plaintiffs' *own* affiliations. Much less did it bear on whether plaintiffs proposed to engage in disruption, a subject on which plaintiffs were evasive. In short, as this Court said in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939):

> "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have adverse. . . . Silence then becomes evidence of the most convincing character."

[4] It is worth noting that none of this has anything whatever to do with plaintiffs' contention (Brief, 19-20) that the ultimate burden of proof rested upon the College. Whatever the merits of that contention may be, it is completely irrelevant since the lower courts merely held that plaintiffs had failed to rebut the College's *prima facie* showing of threatened disruption. This holding obviously involved a factual determination by both courts which should not be upset unless it is clearly erroneous. *Esteban* v. *Central Missouri State College*, 415 F.2d 1077, 1083 (8th Cir. 1969).

In short, the question presented to the courts below was *whether it was unreasonable for the College to require, as a condition of official recognition and support, that students wishing to become affiliated with a violent organization themselves renounce disruption and violence.* Both courts answered that question in the negative, and their decisions were in complete accord with constitutional principles governing state educational institutions.

II. EDUCATIONAL INSTITUTIONS POSSESS THE POWER TO PROTECT THEMSELVES AND THEIR PERSONNEL FROM DISRUPTION AND VIOLENCE.

Although it is completely undisputed that students at state universities are entitled to exercise constitutional rights, it is equally well settled that a university has the authority to prescribe reasonable regulations governing student behavior. As this Court recently stated in *Tinker* v. *Des Moines Community School District,* 393 U.S. 503, 507 (1969):

> On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.

See also *Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *Sword* v. *Fox,* 446 F.2d 1091 (4th Cir. 1971); *Esteban* v. *Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969).

This authority is clearly designed to allow academic officials to prevent disruptive conduct, and nothing in *Tinker* suggests that it is inapplicable to student organizations. Quite the contrary, in *Waugh* v. *Board of Trustees of the University of Mississippi,* 237 U.S. 589 (1915), this Court held that a state's interest in preserving a proper

educational environment justified a statute prohibiting college students from belonging to a fraternity:

> It is said that the fraternity . . . is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the state of Mississippi to determine. It is to be remembered that the University was established by the state, and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership . . . divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity. 237 U.S. at 596-7.

The principles announced in *Waugh* have been repeatedly applied by the courts, see Annotation, 10 A.L.R. 3d 389 (1966), and the case was referred to by Mr. Justice Black, dissenting in *Tinker*, as expressing the "true principles on this whole subject."[5] 393 U.S. at 522. And Mr. Justice Black's remarks were made in a case which presented conduct described by the Court as "closely akin to 'pure speech' ". 393 U.S. at 505. Here, by contrast, the College acted—not to suppress speech—but because it was faced with the threat of disruptive conduct not subject to constitutional protection:

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[5] The classic doctrine expressed in *Waugh* does not, of course, reflect modern concepts of *procedural* due process. See, e.g. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). That issue is not involved in this case, however, since the District Court afforded plaintiffs a full panoply of procedural rights. In addition, it is worth noting that unlike the situation in *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971) and *In Re Stolar*, 401 U.S. 23 (1971), cited by plaintiffs (Brief, 20, 24), the inquiry here dealt specifically with plaintiffs' intended *acts* and had nothing to do with their personal beliefs. Cf. *Sellers* v. *Regents of the University of California*, 432 F.2d 493, 498 (9th Cir. 1970).

> Conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. *Tinker* v. *Des Moines School District, supra,* 393 U.S. at 513.

It is this threat of disruptive conduct, moreover, which renders authorities dealing with other organizations completely irrelevant to the present case. In neither *American Civil Liberties Union of Virginia* v. *Radford College,* 315 F. Supp. 893 (W.D. Va. 1970), nor *University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union* v. *University of Southern Mississippi,* ... F.2d ... (5th Cir. 1971), on which plaintiffs rely (Brief, 14-15), were the courts presented with an organization having a demonstrably violent history. This case, by contrast, presents precisely such an organization, and the College's decision was expressly designed to deal with the resulting threat. Nothing in that decision inhibited in any way the expression of plaintiffs' personal beliefs.

III. TO INTRODUCE THE "CLEAR AND PRESENT DANGER" STANDARD INTO THE OPERATIONS OF A UNIVERSITY WOULD COMPLETELY UNDERMINE ITS EDUCATIONAL FUNCTIONS.

Plaintiffs suggest, however, that official recognition should not have been denied without a showing that their proposed organization presented a "clear and present danger" to the College (Brief, 27, 32). They further contend (Brief, 8) that "when a university is acting as a municipality, it should be required to conform to the same constitutional norms as its governmental counterparts." These contentions completely ignore both the unique function of a university and the decisions of this Court.

A. Constitutional Principles Should Be Applied In the Light Of The Distinctive Purposes and Functions Of A University.

In the application of constitutional principles a university presents a unique situation. At the very least, of course, it must be permitted to maintain an atmosphere of academic freedom for the benefit of *all* its members. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). As this Court said in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident .... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

It is not sufficient, however, merely to preserve an atmosphere of academic freedom. Quite the contrary, a university has the obligation to set standards which are superior to those of the surrounding community. And this is true because a university is a distinctive and fragile institution expressly devoted to dispassionate inquiry and the orderly transmission of knowledge:

> [A university] has not only a legal and moral right but an educational obligation to raise its standards *above* that of the community whose law often expresses no more than the lowest common denominator of what is necessary to prevent men from breaking the social peace. It can therefore require both of its students and faculty conformity with a code of manners, speech, and conduct, provided it is not unreasonable or unjust, *higher* than what obtains in the market place. Hook, *Academic Freedom and Academic Anarchy*, 195 (Cowles Book Co. 1969) (Emphasis in original).

Because of its important and specialized function, therefore, university regulations need not and should not be precisely identical to those adopted by other governmental agencies. Quite the contrary, activities which may be acceptable—or at least not subject to prohibition—when used on the street corner may be entirely unacceptable in a university. This is true not only because an educational atmosphere presupposes a higher degree of decorum than the minimum required on the street, but also because it has long been recognized that direct political entanglements are fundamentally inconsistent with the objectivity necessary in a scholarly community:

> You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passions, however holy. Learned Hand, *On Receiving An Honorary Degree*, published in *The Spirit of Liberty*, 105 (Vintage 1959).

For these reasons plaintiffs' attempt to correlate universities and municipalities is completely untenable. A university is *not* a municipality, does not have the same functions, and has quite properly been permitted to adopt specialized regulations to prevent interference with its scholarly and educational function.

B. Neither This Nor Other Courts Have Applied The "Clear And Present Danger" Standard To Universities.

It is precisely this recognition of the distinctive function of a university which has led the courts *not* to adopt, in educational contexts, the "clear and present danger" standard urged by plaintiffs. Quite the contrary, the courts have been quick to point out that constitutional principles developed in other contexts cannot be mechanically applied to the schools:

> First Amendment rights, *applied in the light of the special characteristics of the school environment,* are available to teachers and students. *Tinker* v. *Des Moines School District, supra,* 393 U.S. at 506 (Emphasis added).

And in *Tinker* this Court went on to hold that the relevant test was not "clear and present danger", but whether:

> The school authorities had *reason to anticipate* that the wearing of the armbands would *substantially interfere with the work of the school or impinge upon the rights of other students.* 393 U.S. at 509 (Emphasis added).

The *Tinker* test is explicitly designed to reflect the unique characteristics of an educational environment. It is neither new nor extraordinary, but is fully consistent with earlier federal decisions. See, e.g. *Burnside* v. *Byars,* 363 F.2d 744 (5th Cir. 1966). For example, as Judge Godbold said in his concurring opinion in *Ferrell* v. *Dallas Independent School District,* 392 F.2d 697, 704-5 (5th Cir. 1968):

> A school may not stifle dissent because the subject matter is out of favor. Free expression is itself a vital part of the educational process. *But in measuring the appropriateness and reasonableness of school regulations against the constitutional protections of the First and Fourteenth Amendments the courts must give full credence to the role and purposes of the schools and . . . careful recognition to the differences between what*

C. The College's Decision Not To Grant Plaintiffs Official Recognition Was Entirely Reasonable And Should Accordingly Be Upheld.

Finally, plaintiffs assert (Brief, 31-33) that the College should have adopted some other method of dealing with disruption and violence. It is well settled, however, that the appropriateness of particular regulations is a discretionary question for the school authorities subject to only limited judicial review. As this Court said in *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968):

> By and large, public education in our Nation is committed to the control of state and local authorities. *Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.* (Emphasis added).

Such a result is entirely reasonable in the light of the school authorities' educational expertise and familiarity with local conditions. It is, moreover, the result uniformly reached by the lower federal courts. See, e.g. *Esteban* v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969); *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966); *Sill* v. *Pennsylvania State University*, 318 F.Supp. 608 (M.D. Penn. 1970). And the reasons which support it are succinctly stated in *Goldberg* v. *Regents of the University of California*, 248 Cal. App. 2d 867, 880, 57 Cal. Rptr. 463, 472 (1967):

> Historically, the academic community has been unique in having its own standards, rewards and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interference. To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the

> educational institutions, nor the ultimate advantages that society derives therefrom. *Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself.* (Emphasis added).

The question presented by this case can therefore not be resolved by talismanic appeals to First Amendment slogans developed for other situations, but requires consideration of the particular facts presented to Central Connecticut State College. Here the College was faced with a violent organization whose local adherents refused, even verbally, to renounce acts of disruption and violence. We submit that under these circumstances it was not unreasonable to deny plaintiffs official College recognition and support.

Finally, plaintiffs' contention (Brief, 25-28) that they were subjected to an unconstitutional "prior restraint" is fully dealt with in respondent's brief. Suffice it to say here that this Court's remarks in *Tinker* anticipated not just the punishment, but also the prohibition, of disruptive conduct. Such a result is entirely sensible, since it would be the height of unreason to require a college to wait until its classes are disrupted or its buildings occupied or burned. And plaintiffs' complaint (Brief, 25) that their proposed organization was "nipped in the bud" has, for these precise reasons, been expressly rejected:

> It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud and prevent it in its inception. *Norton* v. *Discipline Committee of East Tennessee State University*, 419 F.2d 195, 199 (6th Cir. 1969).

CONCLUSION

In short, this is not a complicated case. Its resolution turns on three propositions which are not only reasonable in themselves, but which are fully consistent with the decisions of this Court. Those propositions are:

1. That a university may adopt specialized regulations designed to promote its educational goals, and may protect itself and its personnel by refusing to sanction disruptive and violent conduct;

2. That at the very least a university may expect that students seeking its official support agree to refrain from disruption and violence;

3. That this is particularly so when the students involved seek to become affiliated with an organization which in both word and deed has committed itself to violence, and which further expects its local chapters to conform to its own practices and policies.

We submit that any result other than that reached by the courts below would effectively render educational institutions impotent to preserve their academic freedom as defined by this and other courts. The judgment below should be affirmed.

Respectfully submitted,

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